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7 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
8 SAN FRANCISCO DIVISION

9 IN THE MATTER OF THE)
EXTRADITION OF)
10 PATRICK JOSEPH MCCABE)

NO. CR 10-90622-MISC-SI (MEJ)
MOTION TO RELEASE MR. MCCABE
ON BOND AND TO RECONSIDER
RULING OF MAGISTRATE JUDGE

11)
12) Date: August 13, 2010
13) Time: 3:00 p.m.
14) Ctrm: 10
15)

16 I.

17 **INTRODUCTION AND STATEMENT OF FACTS**

18 In or about October, 2010, Mr. McCabe's attorney in Dublin,
Ireland, Donnough Molloy, Esq., contacted counsel to advise that
19 there was at least one warrant of arrest outstanding against Mr.
20 McCabe relating to an allegation of indecent assault from the
21 mid-1970's. Counsel contacted the United States Attorneys
22 Office and was put in contact with Assistant United States
23 Attorney Phil Kearney who is the prosecutor assigned to
24 extradition matters. Mr. Kearney advised counsel then, and
25 during periodic calls for status over the subsequent nine
26 months, that no extradition request had come across his desk,
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1 but he would so advised counsel if and when he saw one.

2 From the very beginning, in October, 2009, counsel offered
3 to self-surrender Mr. McCabe in the event of any extradition
4 warrant. Counsel also advised Mr. Kearney that Mr. McCabe was
5 74 years old and was suffering from a variety of physical and
6 medical issues which militated in favor of bail being set. Mr.
7 Kearney agreed to a self-surrender, and indicated he would be
8 open to discussing bail.

9 For these reasons, in October, 2009, Mr. McCabe's partner
10 and friend, posted her house, obtained an appraisal, and
11 prepared the appropriate documents for posting security valued
12 at \$400,000.

13 In or about mid-July, 2010, Mr. Kearney contacted counsel
14 and indicated that he had received the extradition papers from
15 the Department of State. Counsel and Mr. Kearney agreed to a
16 self-surrender date of July 30, 2010 before Magistrate Judge
17 James, the duty magistrate. Mr. Kearney indicated, once again,
18 that he would be amenable to discussing bail prior to the
19 surrender date.

20 On July 28, 2010, with notice to counsel, Mr. Kearney
21 obtained a warrant of arrest on the extradition package, signed
22 by Magistrate Judge James. This request was made pursuant to 18
23 U.S.C. Section 3184, which provides, *inter alia*, that any "judge
24 of the United States, or any magistrate authorized so to do by
25 a court of the United States, or any judge of a court of record
26 of general jurisdiction of any State, may, upon complaint made
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1 under oath, charging any person found within the jurisdiction...
2 [with and extraditable offense to another country]...issue his
3 warrant for the apprehension of the person so charged, that he
4 may be brought before such justice, judge, or magistrate judge,
5 to the end that the evidence of criminality may be heard and
6 considered." At the time, counsel believed that Magistrate
7 Judge James was a "magistrate judge authorized" by "a court of
8 the United States" to issue the warrant.

9 Magistrate Judge James did, in fact, issue an arrest
10 warrant for Mr. McCabe on July 28, 2010, but the arrest warrant
11 did not specify any bail. Mr. Kearney's sworn affidavit in
12 support of the Section 3184 arrest warrant did not request any
13 particular bail or no bail, and the extradition packet attached
14 to Mr. Kearney's affidavit did not request any particular bail
15 or no bail.

16 Prior to the self-surrender date of July 30, 2010, Mr.
17 Kearney advised counsel that he would not longer be willing to
18 discuss the issue of bail, and would be requesting that Mr.
19 McCabe be remanded and allowed no bail.

20 Pursuant to agreement, Mr. McCabe timely surrendered to
21 Magistrate Judge James on July 30, 2010. A transcription of the
22 CD of these proceedings is attached as Exhibit A. Both parties
23 filed memoranda of law, in the court file, relating to the issue
24 of bail. Magistrate Judge James set a bail hearing for August
25 4, 2010, and ordered by Mr. McCabe be temporarily released,
26 pending the bail hearing, on a \$500,000 bond, secured by the
27 \$400,000 property posted by his friend and partner, that Mr.
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1 McCabe surrender his passport and post the property with the
2 Clerk by August 2, 2010 at 5:00 p.m., that Mr. McCabe report to
3 Pretrial Services and be subject to house arrest and GPS
4 monitoring, with his only permission to leave home being for
5 court, to visit counsel, and to take care of medical
6 appointments, at the discretion of Pretrial Services.

7 Mr. McCabe reported, as ordered, to Pretrial Services and
8 was subject to house arrest, without incident, until he timely
9 and voluntarily appeared before Magistrate Judge James for the
10 bail hearing on August 4, 2010.

11 On August 2, 2010, as ordered, Mr McCabe surrendered his
12 passport and posted a deed of trust with the Clerk for a piece
13 of property with equity of at least \$400,000.

14 Prior to the bail hearing on August 4, 2010, both parties
15 filed supplemental memoranda on the bail issue. The defense
16 argued, in substance, that special circumstances exist in this
17 case due to the fact that Mr. McCabe, due to his various medical
18 and physical conditions, would deteriorate while in custody.
19 Further, the defense argued that it had substantial legal
20 arguments in opposition to the extradition request itself. The
21 government argued, in substance, that Mr. McCabe would be
22 adequately cared for in custody, and that no special
23 circumstances existed because Mr. McCabe would not physically
24 deteriorate. In support of the government's claim, Mr. Kearney
25 filed a declaration from Dr. Harold Orr, the Regional Director
26 of Prison Health Services, which holds the contract for
27 providing health care at the Santa Rita Jail, in Dublin,
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1 California, the anticipated likely location of Mr. McCabe's
2 incarceration. The Orr declaration stated that Dr. Orr had
3 reviewed the two letters from Mr. McCabe's personal physician,
4 Dr. Sellman, submitted as part of the initial defense bail
5 motion, and had "briefly" reviewed the medical records from Mr.
6 McCabe's physical examination in April, 2010. These letters are
7 attached as Exhibits B and C. Dr. Orr stated, in conclusory
8 fashion, that Mr. McCabe could receive adequate care while at
9 Santa Rita, and would receive an appropriate special diet for
10 his diabetes. The government also argued that Mr. McCabe's
11 legal issues in opposition to the extradition package were not
12 significant enough, at this juncture, to amount to a special
13 circumstance justifying Mr. McCabe's release on bail.

14 Upon receiving Dr. Orr's declaration, the defense filed
15 three declarations including information showing that Prison
16 Health Services and Dr. Orr have been involved, throughout the
17 United States, in a history of shoddy and negligent medical care
18 for over 10 years, resulting in termination of contracts,
19 physical deterioration and injury, and deaths.

20 At the hearing on August 4, 2010, Mr. McCabe's personal
21 physician appeared and testified. This personal appearance was
22 made by Dr. Sellman at the request of Magistrate Judge James and
23 Mr. McCabe. Dr. Sellman testified, in detail, regarding Mr.
24 McCabe's medical condition. He testified, unequivocally, that
25 he stood by the conclusion in his letters from October, 2009 and
26 July, 2010 that his opinion was that Mr. McCabe, due to his
27 physical and mental condition, would deteriorate while in
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1 custody. The details of Dr. Sellman's testimony and opinions
2 are contained in his letters and in his testimony from August 4,
3 2010, attached in the transcribed proceedings and attached as
4 Exhibit D. The defense argued, among other things, that the
5 conclusory declaration of Dr. Orr was insufficient when compared
6 with the live testimony of Dr. Sellman. It further argued that
7 the Court, at the very least, and in light of the significant
8 showing regarding the negligence of Dr. Orr and Prison Health
9 Services, should have required a further evidentiary hearing at
10 which Dr. Orr would be personally present, and evidence would be
11 taken on the capacity of Dr. Orr and Prison Health Services to
12 adequately care for Mr. McCabe at Santa Rita. In support of
13 these arguments, the defense submitted Exhibit A, reviewed by
14 the Court, and attached to this motion as Exhibit E detailing
15 the 40 deaths in Santa Rita as of 2007 under Dr. Orr's regime,
16 and detailing Dr. Orr's cavalier dismissal of the death of a
17 2007 inmate at Santa Rita. The defense and government also
18 orally argued the dual criminality issue, and briefly argued the
19 probable cause issue relating to the extradition packet itself.

20 At the conclusion of the hearing on August 4, 2010,
21 Magistrate Judge James ruled that (1) the posted \$500,000 bail
22 secured by property worth at least \$400,000 would be sufficient
23 for bail in a non-extradition setting; (2) Dr. Sellman's letters
24 and testimony did not amount to special circumstances as a
25 matter of law; and (3) the defense arguments on dual criminality
26 were not strong enough, at this juncture in the proceedings, to
27 amount to a special circumstance justifying bail. Accordingly,
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1 Mr. McCabe was remanded into custody and has been at Santa Rita
2 Jail, in Dublin, California, since that time. At Mr. McCabe's
3 request, the \$500,000 secured bond was not exonerated because
4 the defense advised that it would seek review of Magistrate
5 Judge James' order before the district court.

6 After Mr. McCabe was in the United States Marshal lockup,
7 Deputy Marshal Hanson spoke with counsel to advise that (a)
8 Santa Rita would not accept medications for Mr. McCabe and its
9 medical department would not communicate directly with counsel;
10 (b) counsel should submit a letter to Deputy Hanson detailing
11 Mr. McCabe's medical needs and required medications; and (c)
12 Deputy Hanson would forward this information to Santa Rita.
13 Deputy Hanson also advised that either the Court or the United
14 States Attorneys' Office had inquired, through the United States
15 Marshal, whether Santa Rita could care for Mr. McCabe, and that
16 Dr. Orr had responded and indicated that Santa Rita could, in
17 fact, provide adequate care. Accordingly, the defense submitted
18 a letter to Deputy Hanson detailing the care required by Mr.
19 McCabe while in custody. A copy of this letter is attached as
20 Exhibit F. We are unaware, at this point, of whether this
21 letter has or has not been forwarded to Prison Health Services
22 and/or Dr. Orr.

23 On August 4, 2010, on the bus between 450 Golden Gate
24 Avenue and the Santa Rita Jail facility in Dublin, California,
25 Mr. McCabe was refused access to a bathroom. As such, this 74
26 year old - and nearly 75 year old - gentleman, was forced to
27 urinate on himself in front of the other inmates on the bus. He
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1 was subjected to jeers and humiliation when this occurred. The
2 bus did not arrive at Santa Rita until late in the afternoon -
3 in spite of the fact that the bail hearing had been in the
4 morning. Also, Mr. McCabe, who suffers from a significant
5 diabetic condition as detailed by Dr. Sellman, checked his blood
6 sugar several times per day. The shackles on Mr. McCabe in the
7 bus were placed on him so tightly that the areas where the
8 needle was used to measure his blood sugar began to bleed, and
9 Mr. McCabe bled all over himself and his clothing on the way to
10 Santa Rita.

11 On August 5, 2010, the government submitted proposed
12 findings of fact and conclusions of law to Magistrate Judge
13 James. This was done in spite of the fact that the government
14 had failed to ask permission from Judge James to submit proposed
15 findings of fact and conclusions of law, and in spite of the
16 fact that Judge James indicated that she would be issuing her
17 own findings in a written order. When the defense brought this
18 to the attention of the Court and the government, Mr. Kearney
19 indicated, in an e-mail, that he was 100% certain that he had
20 been invited to submit proposed findings of fact and conclusions
21 of law. The transcript of the August 4, 2010 hearing indicates
22 that the Court never made such a request. The defense, because
23 of the filing by the government, submitted its own proposed
24 findings of fact and conclusions of law on August 5, 2010. As
25 of today, Magistrate Judge James has not issued her written
26 order.

27 Since August 5, 2010, Mr. McCabe has not received one of
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1 his two required medications, Januvia. Santa Rita checked his
2 blood sugar for five days, just once a day, but has, as of
3 yesterday, stopped checking his blood sugar. Mr. McCabe has an
4 ulcer on his leg which is related to his neuropathy condition.
5 He was unable to see Dr. Randall Ammon for his scheduled
6 appointment regarding this condition on August 6, 2010 because
7 he was in custody. This ulcer is getting worse, and his
8 friend/partner, an ex-RN previously treated similar ulcers with
9 saline compresses. Mr. McCabe as received no treatment, the
10 ulcer is getting worse, and it was aggravated by the leg
11 shackles Mr. McCabe was forced to wear in the bus on the way to
12 Santa Rita. Mr. McCabe is not receiving his appropriate
13 diabetic diet, and is forced to wear sandals which aggravate his
14 neuropathy. He saw a doctor for three minutes on August 5,
15 2010. He submitted a requisition to see a doctor regarding his
16 leg ulcer, and today, August 10, 2010, saw Dr. Orr himself for
17 about 10 minutes. Dr. Orr advised that the leg condition
18 required no treatment, and was a garden variety circulatory
19 problem. Dr. Orr said he would attempt to get Mr. McCabe new
20 sandals by sometime next week, and he said he would try to get
21 him his second required daily medication, Januvia, by tomorrow,
22 August 11, 2010. Mr. McCabe is in administrative detention,
23 and his locked in his cell for more than 23 hours per day. He
24 is unable to exercise, in spite of the fact that Dr. Orr said
25 that his neuropathy condition would only improve with exercise.
26 Mr. McCabe is getting no treatment for his prostate, his
27 diabetes, his cardiac condition, his neuropathy, or his
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1 sciatica. Mr. McCabe is not getting any special or required
2 diet for his diabetes and cardiac condition - as promised by Dr.
3 Orr in his August 3, 2010 declaration. In fact, Mr. McCabe is
4 not able to eat most of the regular jail food made available to
5 him, just as it is made available to the other inmates.

6 On August 4, 2010, Mr. Kearney noted that Mr. McCabe was
7 engaged in full body aerobic exercise, including bicycling and
8 yoga, and that Mr. McCabe appeared to be a healthy man. The
9 irony of the situation, of course, is that Mr. McCabe was
10 exercising and eating as medically indicated, and being
11 appropriately treated at the time he appeared in court on August
12 4, 2010. The whole point was that when he would not be able to
13 do this while incarcerated, he would deteriorate. He is
14 deteriorating at this time, just as predicted.

15 In the papers filed in conjunction with the two hearings
16 before Magistrate Judge James on July 30, 2010 and on August 4,
17 2010, the defense cited to the case of Father Markey, a 2009
18 extradition matter out of Indiana. In that case, Dr. Markey was
19 accused by Irish authorities of forcible anal rape of a young
20 boy. With the government's eventual consent, Father Markey was
21 released on a \$10,000 cash bond while he opposed his
22 extradition, and at 82 and suffering from fewer physical
23 ailments than those afflicting Mr. McCabe, he remained free to
24 fight his extradition in the United States. One of the things
25 that occurred in Father Markey's case was that his incarceration
26 and administrative detention caused him to be unable to
27 exercise, and this resulted in his joints locking up and his

1 being unable to walk more than 15 feet at a time. Father Markey
2 also suffered from a prostate condition which was exacerbated by
3 his incarceration in Indiana.

4 After Father Markey was ordered extradited to Ireland, he
5 was released on a 15,000 Euro cash bond (equivalent to \$20,000),
6 posted by a family member, and allowed to live at a Bed and
7 Breakfast in a room paid for by the Catholic Church. His trial
8 is currently set for late October, 2010 or early November, 2010.
9 The defense is currently seeking to obtain a declaration from
10 his Irish attorney detailing these facts. The likely
11 availability of bond in the requesting country is another
12 special circumstance recognized by the United States courts in
13 setting bail. The information on Father Markey's bond in
14 Ireland, which is likely higher than Mr. McCabe's bond would be
15 given the fact that the charges against Father Markey are far
16 more serious, is information not yet available to the defense at
17 the time of the August 4, 2010 bail hearing before Magistrate
18 Judge James.

19 The other special circumstances in support of Mr. McCabe's
20 release on a \$500,000 bond secured by property worth at least
21 \$400,000 and his house arrest under the supervision of Pretrial
22 Services, his passport having surrendered are the strength, at
23 this juncture, of his dual criminality and probable cause
24 arguments, and the concerns of parity as between the treatment
25 of Mr. McCabe and Father Marakey.

26 In conducting research regarding the procedure for
27 obtaining review of the bail order by Magistrate Judge James,

1 counsel has concluded that Magistrate Judge James had no
2 authority under 18 U.S.C. Section 3184 to conduct the bail
3 hearing on August 4, 2010. Rather, it is only the district
4 court which can conduct a bail hearing. Further, it is unclear
5 under Section 3184, given the Local Rules of this Court, whether
6 Magistrate Judge James had the authority to issue the arrest
7 warrant for Mr. McCabe. As such, this motion for bail should be
8 considered *de novo* by this Court, and this Court should permit
9 the taking of additional evidence. To that end, Mr. McCabe
10 intends to offer additional evidence relating to Dr. Orr and
11 Prison Health Services, possible further evidence from Dr.
12 Sellman, and further evidence in connection with the
13 deterioration of Mr. McCabe's physical and medical condition
14 while he has been incarcerated at the Santa Rita Jail since
15 August 4, 2010.

16 II.

17 **THIS COURT, AND NOT THE MAGISTRATE JUDGE, HAS THE JURISDICTION**
18 **TO HEAR THIS MOTION**

19 18 U.S.C. Section 3184, empowers a United States magistrate
20 judge to issue an extradition arrest warrant, and to rule, at an
21 extradition hearing, on the propriety of that warrant, only if
22 the Magistrate Judge has been authorized to do so by "a court of
23 the United States." In reviewing the Magistrates Act, 28 U.S.C.
24 Section 636(a), magistrates are not currently empowered to issue
25 arrest warrants for extradition proceedings. Nowhere in Fed. R.
26 Crim. P. 59, Crim. L.R. 7-1, or Civil Local Rule 72-1 is a
27 Magistrate Judge empowered by this Court to issue an arrest

1 warrant. Therefore, the arrest warrant issued by Magistrate
2 Judge James on July 28, 2010 was not lawful or authorized. As
3 a consequence, Magistrate Judge James is not an authorized
4 Judicial Officer, at least not under 18 U.S.C. Section 3184, to
5 conduct an extradition hearing in this matter. Further, any
6 bail hearings relating to extradition proceedings are not
7 matters which arise under Section 3184, and a magistrate judge,
8 therefore, cannot have jurisdiction to conduct such hearings
9 under Section 3184. *In the Matter of the Extradition of Kirby*,
10 106 F.3d 855, 859 (9th Cir. 1996) ("[A] district judge's
11 authority to grant bail in an extradition case cannot be founded
12 on 18 U.S.C. Section 3184).

13 Crim. Local Rule 7-1(b) specifically provides that "After
14 a case has been assigned to a District Judge pursuant to Crim.
15 L.R. 7-1(a), the criminal calendar Magistrate Judge *may* conduct
16 the following proceedings as deemed appropriate:

17 ...

18 (13) Conduct proceedings for extradition." (Emphasis
19 Added)

20 In this matter, the Local Rules specifically do not
21 authorize a magistrate judge to issue an arrest warrant relating
22 to extradition proceedings, because a magistrate judge may only
23 conduct extradition proceedings *after* a case has been assigned
24 to a District Judge. Here, the Magistrate Judge issued an
25 arrest warrant *before* the case was assigned to a district judge.

26 Nor was this matter a Criminal Case Proceeding Before
27 Assignment to a District Judge under Crim. Local Rule 5-1.

1 Subsection (a) does not permit a magistrate judge to act if a
2 federal statute or rule requires that a proceeding be before a
3 district judge, and Section 3184 does not permit a magistrate
4 judge issue an extradition warrant unless empowered by a court
5 of the United States. Here, the district court has only
6 permitted magistrates to conduct proceedings relating to
7 extradition *after* a district judge is assigned. Further, Rule
8 5-1(b) relates to federal charges and proceedings. This is not
9 a federal charge. And Rule 5-1(c) requires that the extradition
10 warrant be presented to the general duty judge, not the
11 magistrate. In this case, it was not.

12 Extradition matters are not considered criminal matters
13 under the case law. Doyle, Charles and Michael John Garcia,
14 *Extradition to and from United States: Overview of the Law and*
15 *Recent Treaties*, (March 17, 2010) CRS Report for Congress 98-
16 958, Congressional Research Service; Bassiouni, M. Cherif,
17 *International Extradition: United States Law and Practice*, Third
18 Edition, Oceana Publications Inc. (1996). *In re the Matter of*
19 *the Extradition of Kirby*, 106 F.3d 855 at 859-860 makes very
20 clear that bail decisions and their review under 18 U.S.C.
21 Section 3145 in criminal cases are different matters than bail
22 applications to a district court under *Wright v. Henkel*, 190
23 U.S. 40 (1903).

24 Given all of the above, Crim. Local Rule 7-1 cannot act to
25 authorize a magistrate judge who has not derived his or her
26 authority from a properly issued arrest warrant under 18 U.S.C.
27 Section 3184 to conduct any proceedings relating to extradition..

1 See Fed. R. Crim. P. 57(a)(1) (local rules must be consistent
2 with federal law and cannot operate to deprive a party of rights
3 otherwise conferred).

4 Extradition proceedings are not criminal matters.
5 Therefore, arguably, Fed. R. Crim. P. 59 does not apply to
6 extradition proceedings. Fed. R. Crim. P. 59(a) applies only to
7 non-dispositive matters specifically assigned to a magistrate
8 judge by a district judge. The bail hearing on August 4, 2010
9 was not specifically assigned to Magistrate Judge James by a
10 district judge. At that point, no district court judge was
11 assigned to the case. Further, the bail hearing conducted on
12 August 4, 2010 was not a non-dispositive matter. *In re the*
13 *Matter of the Extradition of Kirby*, 106 F.3d 855 at 860 holds,
14 in no uncertain terms, that the bail determination in an
15 extradition case is a final decision of a district court, and,
16 therefore, a dispositive matter.

17 Similarly, Fed. R. Crim. P. 59(b), which applies to
18 dispositive matters, requires a reference by a district judge to
19 a magistrate judge in order for such magistrate judge to
20 exercise jurisdiction. There was no reference here. Rule
21 59(b), even if deemed applicable in this matter, requires *de*
22 *novo* review by the district court and confers upon the district
23 court the ability, in its discretion, to accept new evidence.

24 28 U.S.C. Section 636, similarly, permits specific
25 designation of a magistrate judge to conduct certain
26 proceedings, but such designation must be specifically made by
27 a district judge, and it was not done here. Other than a

1 challenge to conditions of confinement under Section
2 363(b)(1)(B), there is no other part of Section 636 that
3 arguably applies to an extradition proceeding.

4 Local Civil Rule 72-1 also requires a magistrate judge's
5 jurisdiction to arise either from Section 636 or from a specific
6 referral from a district judge. Neither occurred here.

7 The only real basis for jurisdiction in a magistrate judge
8 to conduct extradition proceedings is in 18 U.S.C. Section 3184
9 - but *Kirby* does not permit bail hearings to be heard under that
10 section, and Local Criminal Rule 7-1 does not adequately or
11 lawfully empower a magistrate judge to issue warrants under the
12 same section.

13 For all of the above reasons, this bail application under
14 *Wright v. Henkel* and *Kirby* should be heard *de novo* by this
15 Court, and, inherent in the application, is this Court's ability
16 to, in its discretion, hear additional evidence.

17 III.

18 THERE ARE SPECIAL CIRCUMSTANCES HERE WHICH MERIT MR. MCCABE'S
19 RELEASE ON BOND ON THE SAME CONDITIONS AS ORDERED BY
20 MAGISTRATE JUDGE JAMES ON JULY 30, 2010

21 The United States Supreme Court, in *Wright v. Henkel*, 190
22 U.S. 40 (1903), held that while bail shall not ordinarily be
23 granted in extradition cases, release was not foreclosed where
24 special circumstances exist. Special circumstances have been
25 held to "include the raising of substantial claims upon which
26 the appellant has a high probability of success, a serious
27 deterioration of health while incarcerated, and unusual delay in
28 the appeal process." See *Salerno v. United States*, 878 F. 2d

1 317 (9th Cir. 1989), citing to *Aronson v. May*, 13 L. Ed. 2d 6,
2 85 S. Ct. 3, 5 (1964); *United States v. Williams*, 611 F. 2d 914,
3 915 (1st Cir. 1979); *Galante v. Warden*, 573 F.2d 707, 708 (2d
4 Cir. 1977). The Ninth Circuit has suggested that the strong
5 presumption against bail in extradition proceedings should be
6 abandoned. *Paretti v. United States*, 122 F. 3d 758, 786 (9th
7 Cir. 1997) (*opinion withdrawn upon the flight of the*
8 *respondent*).

9 "In the more contemporary reported cases, granting of bail
10 pending completion of the extradition proceedings has been the
11 rule rather than the exception." *Beaulieu v. Hartigan*, 430 F.
12 Supp. 915, 916 (D. Mass. 1977); vacated on other grounds
13 *Beaulieu v. Hartigan*, 554 F. 2d 1 (1st Cir. 1977). On appeal,
14 the circuit court affirmed the decision of the district court
15 granting extradition, and held. "We do not pursue the question
16 of bail here beyond reiterating that, while bail may be granted
17 in the sound discretion of the district court, the matter should
18 be approached with caution and bail should only be granted with
19 a finding of special circumstances." 554 F. 2d 1.

20 We incorporate, by reference, and in their entireties, our
21 motion for bail and supplemental motion for bail filed below at
22 Docket Numbers 9 and 12, all arguments made at the July 30, 2010
23 and August 4, 2010 hearings below, and the Declarations of David
24 J. Cohen, Esq., filed at Docket Numbers 11, 14 and 15.

25 A. MR. MCCABE'S MEDICAL CONDITION AND THE PROBABILITY
26 THAT HIS HEALTH WILL SERIOUSLY DETERIORATE WHILE
27 INCARCERATED IS A SPECIAL CIRCUMSTANCE.

28 A decision to continue to incarcerate Mr. McCabe would be

1 an act of extreme cruelty in light of his frailty, weakness, and
 2 advanced age, and complicated medical condition, including his
 3 history of cardiac problems, including a triple bypass surgery.
 4 Moreover, serious deterioration of health has been recognized as
 5 a special circumstance. *Salerno v. United States*, 878 F.2d 317
 6 (9th Cir. 1989). Since Mr. McCabe was incarcerated on August 4,
 7 2010, his health and physical condition have, in fact, been
 8 deteriorating.

9 B. MR. MCCABE INTENDS TO RAISE SUBSTANTIAL CLAIMS IN THIS
 10 CASE IN WHICH HE HAS A HIGH PROBABILITY OF SUCCESS;
 11 HIGH PROBABILITY OF SUCCESS HAS BEEN RECOGNIZED AS A
 SPECIAL CIRCUMSTANCE JUSTIFYING THE GRANT OF BOND IN
 AN EXTRADITION PROCEEDING

12 High probability of success has been recognized as a
 13 special circumstance. *Salerno v. United States*, 878 F.2d 317
 14 (9th Cir. 1989); *In the matter of the Extradition of Santos*, 453
 15 F. Supp. 2d 1030 (C.D. Cal. 2006).

16 1. Mr. McCabe Has a High Probability of Success on
 17 His Dual Criminality Argument.

18 For the reasons stated in our filings and our arguments
 19 below, Mr. McCabe has a high probability of success on his Dual
 20 Criminality Argument.

21 2. Probability of Success on the Argument That the
 22 Extradition Packet Does Not Amount to Probable
 Cause

23 a. *In the Matter of the Extradition of Jose*
 24 *Luiz Munoz Santos*

25 Jose Luiz Munoz Santos was charged with violent felonies in
 26 Mexico, including a homicide where the alleged victim was a
 27 child, and when U.S. authorities attempted to arrest him, he led
 28 them on a 30 minute chase. *In re Matter of the Extradition of*

1 *Jose Luiz Munos Santos*, 473 F. Supp. 2d 1030, 1041-1043 (C.D.
2 Cal. 2006).

3 Santos raised numerous special circumstances in his bail
4 application. The court found that the standard of proof set
5 forth in *Nacif-Borge* was not applicable, and that Santos did not
6 need to prove the existence of special circumstances by clear
7 and convincing evidence, rather, by a preponderance of the
8 evidence. *Id.* at 1036.

9 Even though Santos had tried to flee when U.S. agents
10 attempted to stop him, leading the agents on a 30 minute chase,
11 during which the agents had their red lights activated, he was
12 released on bail. *Id.* at 1041.

13 The court held "In this case, the uncertainty regarding the
14 ultimate validity of the arrest warrant, the existence of
15 probable cause...make the government's probability of success
16 sufficiently unclear that it constitutes a special circumstance
17 warranting Santos's release on bail. *Id.* at 1040.

18 Bail was set at \$450,000.00. Santos was required to
19 surrender his passport, and he was placed on home confinement
20 and electronic monitoring. *Id.* at 1043.

21 Mr. McCabe, like Mr. Santos, disputes that there has been
22 competent legal evidence, establishing probable cause, presented
23 to believe that Mr. McCabe committed the charged offenses.

24 Just like in Santos, there is a layer of uncertainty
25 surrounding the allegations made against Mr. McCabe.

26 b. *United States of America v. Artukovic*

27 The court in *United States of America v. Artukovic* was not
28

1 satisfied by the presentation of numerous affidavits, not signed
2 by the actual affiants.

3 *United States of America v. Artukovic*, 170 F. Supp. 383,
4 390-391 (C.D. Cal. 1959).

5 Exactly like in *Artukovic*, the statements produced against
6 McCabe were not in fact signed by the actual affiants. The
7 statements were allegedly made to Irish Police Officers and then
8 those officers wrote out their conclusions based on what they
9 were told.

10 Commissioner Hocke held, in denying the extradition request
11 of Artukovic, a suspected mass murderer, "I am presented with
12 someone else's conclusion of what the testimony was. This is
13 very unreliable evidence which can be given little weight." *Id.*
14 At 390.

15 The court also did not give much weight to testimony that
16 was given ten years after the incident occurred. The court
17 stated "One must also keep in mind that the events to which the
18 witnesses testified took place at least ten years before the
19 testimony was taken. The passage of time tends to reduce the
20 weight which may be given to evidence." *Id.* at 391.

21 In Mr. McCabe's case, the events allegedly occurred between
22 29 and 35 years ago. The passage of time weighs against the
23 reliability of this evidence against Mr. McCabe. This court was
24 not actually presented with affidavits signed by the accusers
25 themselves, but rather with someone else's conclusion of what
26 was said. The evidence in McCabe's case is equally unreliable.

27 Artukovic, an alleged mass murder, was released on bail in
28

1 1951, and the extradition request was denied in 1959. He was
2 eventually extradited many years later.

3 c. In the Matter of the Extradition of Ricardo
4 Gonzalez and Victor Huerta

5 The extradition of Gonzalez and Huerta was sought by Mexico
6 for the crime of bank robbery. *In the Matter of the Extradition*
7 *of Gonzalez, et. al.*, 52 F. Supp. 2d 725, 728 (W.D. La. 1999).
8 Both parties were arrested trying to use the traveler's checks
9 at a U.S. bank. *Id.* at 732.

10 The court found that insufficient probable cause had been
11 presented to support the extradition, and that the movers had a
12 substantial likelihood of success on the merits at the
13 extradition hearing. *Id.* at 738.

14 C. WHERE BAIL IS AVAILABLE IN THE REQUESTING COUNTY ON
15 THE UNDERLYING SUBSTANTIVE OFFENSE, THERE EXISTS A
16 SPECIAL CIRCUMSTANCE JUSTIFYING THE GRANT OF BAIL IN
17 THE ASYLUM STATE

18 1. *In re Gannon*

19 Gannon was granted bail, while the extradition matter was
20 pending, due to the fact that the offense charged (obtaining
21 money under false pretenses), was a bailable offense in both the
22 requesting nation, and the requested state. *In re Gannon*, 27 F.
23 2d 362 (E.D. Pa 1928).

24 The offense of indecent assault, is one in which Mr. McCabe
25 would be entitled to bail in Ireland. (See Declaration of David
26 Cohen dated August 10, 2010).

27 2. *In the Matter of the Extradition of Kamel Nacif-*
28 *Borge*

Mr. Nacif-Borge was arrested on a Mexican arrest warrant

1 and sought to be extradited for allegedly failing to pay taxes
2 on over \$50,000,000 Mexican pesos (roughly \$15,000,000 in U.S.
3 currency). *Id.* at 1212. Through counsel he requested bail and
4 raised the following special circumstances (1) substantial
5 probability of success on his claims; (2) serious deterioration
6 of health; (3) unusual delay; (4) timing of the provisional
7 arrest; (5) offer of compromise; (6) length and complexity of
8 extradition proceedings; (7) seriousness of the offense; (8)
9 character of extraditee; (9) bail considerations in Mexico. *Id.*
10 at 1216-1221.

11 The court found that Nacif should be granted bail due to
12 the fact that bail would be granted in Mexico on the substantive
13 underlying offense. *Id.* at 1221. The court, after having
14 determined that bail was appropriate, and in light of the
15 special circumstances underlying the grant of bail in his case,
16 looked to the amount of bail Mexico would set for Nacif under
17 Mexican law. *Id.* at 1222. Based on a complicated analysis, bail
18 was set at over \$12 million dollars. This was determined to be
19 fair by the court, given that evidence had been presented
20 illustrating that Mr. Nacif had substantial assets, and friends
21 who were willing to contribute up to \$2 million dollars towards
22 his bail. *Id.* at 1223.

23 3. *United States v. Taitz*

24 In *U.S. v. Taitz*, 130 F.R.D. 442, 443 (S.D. Cal. 1990), the
25 U.S. Attorney filed a complaint seeking the arrest of Allen
26 Taitz for extradition to Republic of South Africa for 434 counts
27 of fraud related to diamond transactions. Mr. Taitz filed an
28

1 application for bail in this matter. The court analyzed the
2 record and the legal precedent and found the following special
3 circumstances: (1) potentially insufficient probable cause on
4 each of the 434 counts; (2) Taitz had no prior record and was
5 not charged with a crime of violence; (3) Taitz had suffered
6 some health difficulties in the form of allergic reactions to
7 corn and corn sweeteners, which were common substances in the
8 food at the jail, he was also allergic to the soap used, the
9 court saw that he was scratching himself during the bail
10 hearing; (4) Taitz was an orthodox Jew and was unable to carry
11 out religious rituals; (5) no diplomatic necessity for denying
12 bail here, because the law of South Africa would allow bail
13 prior to extradition being certified, and fraud is aailable
14 offense in South Africa. *Id.* at 445-447.

15 The court found special circumstances and order Taitz's
16 release on bail. He was released on a \$500,000 bond secured by
17 property. *Id.* 447. The court held that "there can be no
18 diplomatic concern by South Africa if the United States releases
19 on bail a person who is facing extradition to South Africa where
20 bail is available in South Africa for persons facing extradition
21 to the United States." *Id.*

22 4. *In the Matter of the Extradition of Jaime Morales*

23 Morales produced evidence that under Mexican law, fraud is
24 aailable offense. *In the Matter of the Extradition of Jaime*
25 *Morales*, 906 F. Supp. 1368, 1376 (S.D. Cal. 1995). The court
26 held "While this fact, alone, would not, in this Court's view,
27 justify Morales' release on bail, in combination with the other
28

1 factors mentioned above, it contributes to the Court's finding
2 of 'special circumstances' justifying bail in this case." *Id.*

3 D. MR. MCCABE'S PARITY WITH FATHER MARKEY WHO WAS GRANTED
4 A CASH BAIL OF \$10,000 IN THE UNITED STATES DISTRICT
5 COURT FOR THE DISTRICT OF INDIANA AND WHO HAS BEEN
6 GRANTED A CASH BAIL OF \$15,000 EUROS, OR APPROXIMATELY
7 \$20,000 FOR THE UNDERLYING SUBSTANTIVE OFFENSE OF
8 BUGGERY, THAT IS, FORCEABLE ANAL RAPE OF A CHILD, A
9 FAR MORE SERIOUS OFFENSE THAN THE INDECENT ASSAULTS
10 WITH WHICH MR. MCCABE IS CHARGED, IS A SPECIAL
11 CIRCUMSTANCE JUSTIFYING THE GRANT OF BOND IN THIS
12 CASE.

13 1. *In the Matter of the Extradition of the Requested*
14 *Extradition of Terence Damien Kirby*

15 Terence Damien Kirby, along with Pol Brennan, Kevin Artt,
16 and James Smyth was a member of the Irish Republican Army. (See
17 Exhibit). Terence Kirby was sought to be extradited to the
18 United Kingdom for escaping, along with 35 other prisoners from
19 Maze prison. *In the Matter of the Extradition of Terrence Damien*
20 *Kirby*, 106 F. 3d 855, 857 (9th Cir. 1996).

21 Terence Kirby was being held in prison at Maze prison after
22 being convicted of murder. **Mr. Kirby raised special**
23 **circumstances, including the grounds that he should have parity**
24 **with Smyth.** *Id.* at 863. The argument was that a similarly
25 situated extraditee, James Smyth, had been out on bail for over
26 a year at the time the district court held a bail hearing for
27 Mr. Kirby, and in order to have parity of treatment, Kirby
28 should be released also. *Id.* The court considered this
argument as a special circumstance.

The court found that even though the special circumstances
raised were "weak," special circumstances did exist. *Id.* at 864-
865. The grant of bail to Mr. Kirby by the district court, on a

1 \$1,000,000 bond, even though he was a convicted murdered accused
2 of a prison break and alleged to be a terrorist by one of our
3 allies, the United Kingdom, was affirmed by the 9th Circuit. *Id.*
4 at 858-865. The bail granted to Brennan and Artt by the district
5 court in the amount of \$500,000 was also affirmed. *Id.*

6 Mr. McCabe asserts the same grounds as raised in Kirby,
7 that he should have parity with Father Markey, who was granted
8 bail pending extradition in the Northern District of Indiana.

9 2. Parity With Father Markey

10 Father Francis Markey, is an Irish priest who was indicted
11 by the Director of Public Prosecutions in Ireland for two counts
12 of buggery. *Francis Markey v. United States Marshal Service*,
13 2010 U.S. Dist. Lexis 38082 (N.D. Indiana, 2010). Buggery, under
14 Irish law, is essentially rape of a child. (See Declaration of
15 David Cohen dated August 10, 2010). The allegations against
16 Father Markey, are based on statements from a person about
17 incidents that occurred 42 years ago. 2010 U.S. Dist. Lexis
18 38082 at 10. The U.S. Attorney moved for his extradition, and
19 this extradition was challenged by his federal defender, who
20 also made a motion for bail on behalf of Father Markey.

21 In Father Markey's motion for bail, his counsel raised the
22 following special circumstances: that Markey was 82 years of age
23 and in poor health; that he has a history of cerebral vascular
24 accident (stroke); that he has atrial fibrillation,
25 hypertension, diabetes, and requires a pacemaker; that he
26 suffers from congestive heart failure; that he is medically
27 fragile. In custody, Markey's mobility decreased. See Exhibit

1 G, Francis Markey's Motion for Bail.

2 Even though Father Markey was facing two counts of child
3 rape, on the basis of the above factors, special circumstances
4 were found, and he was released on bail on a \$10,000 cash bond.
5 Initially, the United States opposed the release of Father
6 Markey, however, the United States withdrew its objection to his
7 release and negotiated an agreement for release with Father
8 Markey with the following conditions: \$10,000 cash bond, ordered
9 to appear at all proceedings, surrender of passport, travel
10 restricted to Northern District of Indiana and the Western
11 District of Michigan. See Exhibit H, Magistrate Judge
12 Nuechterlein's Order of Nov. 16, 2009.

13 Mr. McCabe is similarly situated to Father Markey. In fact,
14 Mr. McCabe seems to have more serious health problems than
15 Father Markey. Mr. McCabe is 74 years old, and will turn 75 on
16 September 12. Mr. McCabe is very fragile and has sustained
17 numerous injuries since he was incarcerated. (See Declaration of
18 David Cohen dated August 10, 2010). Mr. McCabe has not been
19 accused of committing any offenses as serious as the crime of
20 buggery.

21 Mr. McCabe also has put together a bail package where his
22 close personal friend has deeded her home to the court, valued
23 at \$400,000.00. He has surrendered his passport, and was
24 submitting to electronic monitoring before he was remanded.

25 Father Markey was eventually extradited, however, he is now
26 awaiting trial and is out on bail in Ireland. The bail for two
27 counts of buggery is 15,000 euros which is approximately \$20,000

1 U.S. dollars. Counsel for Mr. McCabe has learned from the Irish
2 solicitor who is representing Mr. Markey, that bail for Mr.
3 McCabe would be approximately 15,000 euros if he was extradited
4 to Ireland. (See Declaration of David Cohen dated August 10,
5 2010).

6 E. THIS COURT MAY FIND SPECIAL CIRCUMSTANCES EVEN IF
7 THEIR EXISTENCE IS DEEMED TO BE "WEAK," AND THE COURT
8 MAY COMBINE FACTORS EVEN IF AN INDIVIDUAL FACTOR,
9 ALONE, DOES NOT AMOUNT TO A SPECIAL CIRCUMSTANCE

10 *In the matter of the Extradition of Sandor Molnar*, 182 F.
11 Supp. 2d 684 (N.D. Ill. 2002), the court concluded that each
12 item on the list of special circumstances presented by the
13 relator was not sufficiently "special" to permit release. The
14 court, however, concluded that in the provisional arrest
15 setting, (in which we now find ourselves), the special
16 circumstances advanced by the relator must be reviewed
17 collectively rather than singularly. Further, when viewing
18 these factors collectively, any case for special circumstance,
19 even a weak one, is sufficient to permit bail so long as the
20 relator demonstrates that his or her conditions of bail will
21 address any concerns relating to flight risk. In this case, the
22 court should view all the special circumstances advanced by Mr.
23 McCabe, together with his substantial bail proposal, the fact
24 that he is not a flight risk and the fact that he is not a
25 danger to the community, and conclude that bail should be
26 granted at this stage in the proceedings.

IV.

**THE AUGUST 4, 2010 RULING BY MAGISTRATE JUDGE JAMES WAS
FACTUALLY AND LEGALLY IN ERROR**

For all of the above stated reasons, Magistrate Judge James was not correct in concluding that the facts and law here simply do not permit her the discretion to set bail. They do. Her ruling that she had no such discretion even though there exist special circumstances and the existing conditions of bail would satisfy the concerns of flight risk and danger to the community was erroneous as a matter of law.

V.

CONCLUSION

For the above stated reasons, this Court should grant Mr. McCabe's request to hear further evidence on the bail issue, and should release Mr. McCabe on bond pursuant to the same conditions that were ordered by Magistrate Judge James on July 30, 2010.

Respectfully submitted,

Dated: August 10, 2010

BAY AREA CRIMINAL LAWYERS, PC

By: /s/ David J. Cohen
DAVID J. COHEN, ESQ.

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Patrick McCabe